August 11, 2004 **EX PARTE**
<u>VIA ELECTRONIC FILING</u>

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: <u>CC Docket Nos. 01-338, 96-98 and 98-147</u>

Dear Ms. Dortch:

The purpose of this letter is to respond to recent *ex parte* presentations by Verizon and explain why the availability of tariffed special access services should be deemed irrelevant to the Commission's impairment analysis for high-capacity loops, interoffice transport, enhanced extended loops ("EELs"), and entrance facilities (collectively "transmission facilities") in its remand proceeding from D.C. Circuit's decision in *United States Telecom. Assoc. v. FCC*.[1]

Summary

As explained herein, contrary to Verizon's arguments, the current usage of special access by telecommunications carriers generally is not a reliable indicator that, without the availability of unbundled high capacity transmission facilities, competitive local exchange carriers ("CLECs") could operate successfully using tariffed special access services. Verizon makes no attempt to account for the fact that existing regulation (including separate affiliate requirements in the long distance market and the availability of unbundled network elements ("UNEs")) as well as the absence of incumbent local exchange carrier ("ILEC") incentives to discriminate in the CMRS market demonstrate why all-inclusive data on special access usage cannot be used as evidence of non-impairment. If, as Verizon urges, wireline competitors in the local and access markets were required to rely on special access for transmission facilities *without* the benefit of separate affiliates, affiliate transaction rules, effective rate regulation or, most importantly, the availability of UNEs, to limit ILEC opportunities to discriminate, ILECs would be handed the opportunity to have their way with CLECs. Such a development cannot be what Congress intended, and reliance on special access as the justification for eliminating transmission facilities would be unquestionably inconsistent with sound public policy.

Ironically, it is the very presence of unbundled transmission facilities today which makes the argument by the ILECs arguably worthy of consideration. UNEs function as a material

[1] 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

check on potential abuses by ILECs in the provision of special access services, thereby giving Verizon's argument any measure of seriousness that it might enjoy. However, due to the grant of pricing flexibility in special access services over five years ago, an action which assumed that special access service would be used primarily by interexchange carriers, reliance upon tariffed special access services alone to support competition in local markets would be misplaced. In the absence of unbundled transmission facilities, the ILECs would have numerous opportunities for price and non-price discrimination in local and the exchange access markets.

In any event, Verizon's attempt to equate the historical purchase of special access by CLECs with proof of a lack of impairment[2] without access to unbundled transmission facilities must be rejected. Verizon lumps all special access lines together and makes no attempt to specify which "competing carriers" are purchasing these facilities and for what purposes. Simply stated, it is impossible to know, assuming the availability of special access were even relevant, what the ratio of CLEC-purchased special access lines-to-UNEs is when used to provide local and exchange access services. Moreover, Verizon does not account for circumstances in which CLECs are faced with no choice but to purchase special access if they are to enter a market or secure a customer. Another flaw with Verizon's empirical analysis is that it lacks the granularity required by the courts for any proper impairment analysis.

Finally, based on XO's own experience which is described in greater detail below, the elimination of unbundled loops and transport would make "competitive entry uneconomic" for any carrier seeking to serve the full range of small, medium and large business customers.

For these reasons, as explained in detail below, the Commission should adopt a blanket rule treating the availability of ILEC tariffed service as irrelevant to an impairment analysis regarding unbundled high capacity loops and transport.

1. The Court in USTA II Recognized That A Blanket Rule Might Be Justified That Treats the Availability of ILEC Tariffed Service As Irrelevant to Impairment Analysis

In *USTA II*, the D.C. Circuit held that the FCC failed in the *Triennial Review Order* to explain why it did not consider the availability of special access in its impairment analysis, namely when considering whether CMRS carriers are impaired in the absence of unbundled transport. The court observed that exclusive reliance on special access has allowed CMRS competition "not only to survive but to flourish" and has "obviously not made competitive entry uneconomic."[3] The Court concluded that, as a result, it is not readily apparent that impairment

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2 *See* Ex Parte Letter from Michael E. Glover, Verizon to Marlene H. Dortch, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (July 2, 2004) ("*Verizon Special Access Letter*").

3 *USTA II*,. 359 F.3d at 376, 377. CMRS presents a different situation than wireline competition. The risk of price and non-price discrimination is not as great for CMRS carriers as it is for CLECs, because CMRS carriers built up their networks for two decades before UNEs become available and otherwise rely on a distinctly different infrastructure and network architecture, not to mention traffic pattern, than do wireline carriers that service customers using DS-1 loops and EELs. CMRS carriers are not competing for such customers. Moreover, as detailed below, BOCs and other ILECs have diminished incentives to discriminate to the benefit of non-wholly owned affiliate CMRS operations. BOC-affiliated CMRS carriers operate in the service territories of other BOCs, such that discrimination could lead to retaliation. Further, the CMRS industry is dominated by five, nearly nationwide competitors, radically unlike, and inherently more robust than, the more disaggregated and non-ubiquitous group of CLECs that seek access to UNEs. Finally, BOCs provide CMRS operations through corporately separate affiliates.

exists for CMRS carriers. Despite this commentary, the court did not extrapolate similar observations to consideration of possible non-impairment for wireline competitors. Indeed, the Court stated that the incumbent LECs' incentive to set tariff prices as high as possible combined with the administrative difficulties of overseeing tariffs "might in principle support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment."[4]

There is powerful support for establishing a "blanket rule" that the availability of ILEC tariffed special access service is irrelevant to an impairment analysis for at least those requesting carriers seeking to use unbundled transmission facilities to provide *wireline* local and access services. As explained below, the language and structure of the 1996 Act demonstrate that Congress intended that competitive providers of such services would be able to obtain essential inputs from ILECs as UNEs. Commission precedent and bedrock principles of competition policy confirm that this approach is the only adequate means of limiting ILEC opportunities to engage in price and non-price discrimination against their competitors if tariffed special access services are relied upon in lieu of UNEs.

2. The Terms And Structure Of The 1996 Act Reflect Congress' Intent That CLECs Obtain Essential Inputs Such As Loops And Transport As UNEs Rather Than As Special Access When Providing Local And Access Wireline Services.

Verizon's argument pre-supposes that the availability of special access, standing alone, is sufficient to defeat the impairment test. By the time Congress adopted the Telecommunications Act of 1996, ILECs had been providing special access services to IXCs and large business customers for more than a decade. The regulatory framework for providing loops (referred to as channel terminations in the special access context) and interoffice transport pursuant to interstate special access tariffs was stable and well-understood. Congress theoretically could have required needed adjustments to these tariffed offerings and established them as the vehicle for CLECs to obtain loops and transport to compete in the newly-opened local exchange market. But it did not. Instead, it established a legal obligation for ILECs to provide competitors with UNEs at prices "based on cost" and on "nondiscriminatory" terms and conditions. *See* 47 U.S.C. §§ 252(d), 251(c)(3).[5]

The language and structure of the 1996 Act demonstrate that Congress intended that facilities-based CLECs would rely on UNEs as the means of obtaining needed inputs for competitive local and access services. By contrast, Congress contemplated that special access would in the future be purchased primarily or exclusively by competitive providers of long distance and information services, not by competitive providers of local exchange services. Congress created entirely separate regulatory frameworks in which it hoped competition would be nurtured for each product market. Significantly, the 1996 Act only refers to special access in the context of competitive long distance and information services. For example, Section 251(g) preserves equal access and nondiscrimination regulations applicable to "exchange access, information access and exchange services" purchased by "interexchange carriers and information service providers." *Id.* at § 251(g). Similarly, Section 272(e), which establishes structural separation for BOC in-region interLATA telecommunications and information services, imposes

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4 USTA II, 359 F.3d at 376.

5 In addition, under Section 271 of the Act, RBOCs must provide loops and transport unbundled from each other and from switching. 47 U.S.C. § 271(c). In other words, even after conditions of impairment no longer exist in the cases of loops and transport, these categories of network elements must still be provided on an unbundled basis, not simply as part of a completed tariffed special access service.

nondiscrimination obligations on the BOC's provision of "telephone exchange service" and "exchange access" service. *Id*. at § 272(e). These provisions demonstrate that Congress expected that competitive providers' stand-alone interexchange service would continue to rely on "exchange access" (including, of course, special access) and that providers of stand-alone information services would continue to rely on the special access, telephone exchange and "information access" arrangements to obtain access to ILEC networks.[6] Importantly, however, Congress specified that BOCs would compete against such interexchange and information service offerings through Section 272 separate affiliates to address the threat of price and non-price discrimination.[7]

In contrast, Congress chose not to require that ILECs establish separate wholesale and retail affiliates for their local operations. As described below, the integrated ILEC structure for local services creates substantial opportunities for them to engage in price and non-price discrimination against their competitors. To address this problem, Congress required that UNEs be offered at cost-based prices (limiting opportunities for price discrimination) and on "nondiscriminatory" terms and conditions instead of simply prohibiting "unjust or unreasonable discrimination" as is the case under the Section 202 language governing special access (limiting opportunities for non-price discrimination).

Congress clearly intended that transmission facility UNEs, not special access, would be the means by which the ILECs' local competitors would obtain essential transmission capabilities and compete for local exchange and exchange access customers. For example, the competitive checklist in Section 271 requires compliance with Section 251(c) unbundling *and does not even address special access*.[8] The goal of Section 271 is to ensure that the market for local exchange and exchange access, which the BOCs provide on an integrated basis, is open to effective competition as a precondition for interLATA entry. By establishing compliance with the unbundling requirements as a precondition to in-region interLATA entry, and by omitting any such condition with regard to special access, Congress signaled that UNEs would be the means by which CLECs would compete in the previously closed local market.

The statutory provisions governing collocation further confirm the foregoing interpretation. Section 251(c)(6) makes physical collocation, a crucial input for competitors, only available for purposes of obtaining "access" to UNEs and "interconnection" for purposes of exchanging local exchange and exchange access traffic (ILEC integrated offerings). *See id.* § 251(c)(6). Collocation was not seen as a primary means for fostering competition in the long distance or information access markets. In fact, the D.C. Circuit has held that the FCC does not

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6 Indeed, providers of stand-alone information services are not even eligible to obtain access to UNEs and other inputs under Section 251(c) because those inputs are only available to competing providers of telecommunications services. *See, e.g.*, 47 U.S.C. § 251(c)(3) (limiting the duty to provide UNEs to "any requesting telecommunications carrier").

7 Independent ILECs were already subject to the separate affiliate requirements established in the *Competitive Carrier* proceeding. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 98 FCC 2d 1191, ¶7 (1984) ("Competitive Carrier Fifth Report and Order")

8 *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶348 (2000) (*SWBT Texas 271 Order*)

even have the authority to mandate physical collocation for the sole purpose of obtaining access to special access circuits.[9]

It is also significant that, while Congress gave the FCC broad authority to establish the overall framework for obtaining access to UNEs regardless of the jurisdictional nature of the traffic traversing those facilities,[10] it did not bother to address the jurisdictional limitations of special access in the 1996 Act. Under current law, a special access circuit qualifies as interstate only if more than 10 percent of the traffic traversing the facility is interstate. *See* 47 C.F.R. § 36.154(a). It may be that most local service lines meet this requirement, but this is surely not the case with regard to all end user connections. The repeated monitoring of traffic flows and the uncertainty of compliance due to end user calling patterns make interstate special access an inappropriate means of reliable, widespread entry. Reliance on state special access offerings would be neither efficient (due to the patchwork of diverse and sometimes inconsistent state requirements) nor consistent with the intent of Congress to establish a national framework for local competition.

Thus, the language and structure of the 1996 Act leave little room for doubt that Congress expected that CLECs competing with ILEC integrated service offerings (such as local and access services) must be able to obtain inputs from ILECs in the form of cost-based UNEs provided on a nondiscriminatory basis, not special access facilities provided on a reasonably nondiscriminatory basis. As explained below, Commission precedent and sound public policy confirm that this is the only possible approach. In the absence of unbundled transmission facilities, above-cost special access that is not subject to meaningful service quality requirements and controls on rate levels offer far too many opportunities for ILEC discrimination that would frustrate the remaining sole means of competing with services offered by ILECs on an integrated basis.

3. The Elimination Of Unbundled Loops And Transport Based On The Availability of Tariffed Special Access Would Leave The ILECs Free To Act On Their Powerful Incentives To Engage In Anticompetitive Discrimination.

For special access to constitute a substitute for UNEs, the Commission must find that CLECs can compete by relying on special access even for those customer locations and along those transport routes on which the ILEC controls the *only* transmission facilities. Commission precedent and sound public policy preclude any such conclusion.

As an initial matter, looking at the ILECs' provision of transmission facilities on a tariffed basis as an adequate basis in itself for a finding of no impairment conflicts with recent views of the Commission on impairment analyses. In the *Triennial Review Order,* the Commission required a granular approach complemented by an examination, within relevant geographic markets or along relevant routes, of whether a multiplicity of carriers were self-provisioning facilities or whether a multiplicity of carriers were providing wholesale services in competition with the ILECs. This is in stark contrast to what Verizon has urged, which is to look solely at the ILEC's provision of tariffed services.

9 *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

10 *See AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 380-383 (1999).

It is well established that, where an ILEC has market power over an upstream input needed by competitors in downstream markets, the ILEC has powerful incentives to engage in price and non-price discrimination in the provision of that input to competitors. As the Commission explained in the context of advanced services (which are quickly emerging as a core offering of XO and other CLECs):

> Because incumbent LECs . . . compete with other providers of advanced services, they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new services to consumers. They also have the incentive to limit or control the development of new services to the extent new services compete with their current offerings. In addition, competitors often are totally dependent on incumbent LECs for last mile wireline access to end users.[11]

Similarly, the Commission observed in the context of wireline long distance services that, "as long as the BOCs retain control of local bottleneck facilities, they could potentially engage in improper cost allocation, discrimination, and other anticompetitive conduct to favor their affiliates' in region, interLATA services." [12]

As to price discrimination, perhaps the most obvious form of anticompetitive exclusionary behavior by a wholesaler that competes with its customers at the retail level is the price squeeze. The FCC has found the ILECs have powerful incentives to subject their competitors in downstream retail markets to price squeezes where such competitors must rely on the ILECs for wholesale access services. The Commission has explained the problem as follows:

> Absent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once the incumbent LEC began offering in-region, interexchange toll services. . . . The incumbent LEC could do this by raising the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services,

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[11] See *Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, ¶ 202 (1999) ("*SBC-Ameritech Merger Order*").

[12] *Regulatory Treatment Of Lec Provision Of Interexchange Services Originating In The Lec's Local Exchange Area and Policy And Rules Concerning The Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, ¶ 134 (1997) ("*LEC Classification Order*").

thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.[13]

As to forms of non-price discrimination, the Commission explained that: "there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA [or local and access service] carriers, such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network."[14] These same types of non-price discrimination are available to ILECs if competing local carriers must rely on the ILECs' tariffed special access services to provide local exchange and exchange access services.

The central question, then, is whether the regulations applicable to special access are adequate to limit the ILECs' *ability* to act on these incentives where, as is often the case, the ILEC provides the special access service via transmission facilities over which it holds a monopoly and where the CLEC seeks to use the special access as an input in the provision of local or access (including broadband) services. Commission precedent answers this question unambiguously. Many times in the past, the Commission has been forced to identify the regulatory constraints that are necessary to limit ILECs' ability to engage in anticompetitive discrimination where competitors' primary means of obtaining access to the ILEC network is through the ILECs' exchange access tariffs (including, of course, special access). The Commission has offered slightly different explanations and placed varying emphases on the different applicable regulations depending on the context. Nevertheless, the Commission has consistently relied on the presence of separate affiliate safeguards, affiliate transaction rules, price cap regulation, and (in most cases) the availability of UNEs as, taken together, necessary to prevent ILEC anticompetitive discrimination in the provision of tariffed services to provders in the long distance and information access markets.

For example, in the context of BOC in-region entry into the interLATA market, the FCC considered the regulations needed to constrain the BOCs' opportunities to leverage control over upstream transmission inputs by harming competition in downstream markets. There, the FCC concluded, in general, that the detailed prohibitions against discrimination in Section 272(c) and (e) combined with "the structural separation requirements of section 272(b)" and in particular the requirement that "an affiliate must obtain any [ILEC] facilities on an arm's length basis pursuant to section 272(b)(5), thereby increasing the transparency of transactions between a BOC and its affiliates" were necessary to prevent discrimination.[15] As to price squeezes, the FCC recognized that "absent appropriate safeguards" a BOC would be tempted to engage in this type of exclusionary discrimination.[16] In fact, the FCC acknowledged that above-cost access charges could create opportunities for BOCs to engage in price squeezes as they entered interexchange and information access markets, and it rejected the BOCs' argument that price squeeze strategies would be unprofitable.[17] The FCC held that the risk of such discrimination could be addressed by a combination of separate affiliate requirements, price cap regulation of BOC exchange

13 *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 277 (1997) ("*Access Charge Reform First Report and Order*").

14 *LEC Classification Order* ¶ 111.

15 *LEC Classification Order*, ¶ 116.

16 *LEC Classification Order,* ¶ 125.

17 *LEC Classification Order,* ¶ 127.

access services and the "ability of competing carriers to acquire access through the purchase of unbundled network elements."[18]

Similarly, in the *Access Charge Reform* proceeding, the Commission responded to the specific argument that "interstate access charges [including special access charges] that are above the true economic cost of providing the underlying services" give ILECs the opportunity to engage in price squeezes in the long distance market.[19] The Commission explained that "although an incumbent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze, we have in place adequate safeguards against such conduct."[20] Those "adequate safeguards" consisted of price cap regulation combined with separate affiliate requirements applicable to both independent and BOC in-region long distance services and the availability cost-based UNEs.[21] As to the latter, the Commission explained that "so long as an incumbent LEC is required to provide unbundled network elements quickly, at economic cost, and in adequate quantities, an attempted price squeeze seems likely to induce substantial additional entry [through network elements] in local markets."[22]

The Commission later retreated somewhat from its reliance on the availability of UNEs in the *Supplemental Order Clarification*[23] of the *UNE Remand Order* in which it established temporary use restrictions on unbundled loop-transport combinations. The use restrictions established special access as the only means of purchasing loop-transport combinations where the long distance carrier could not demonstrate that it provided a "significant amount of local exchange service" over the facilities.[24] Although some parties argued that this would allow ILECs to engage in price squeezes or other anticompetitive practices in the downstream long distance market,[25] the Commission disagreed. It explained that "Congress anticipated that some Bell Operating Companies ('BOCs') would obtain authorization under 47 U.S.C. § 271 to originate in-region long distance services before the completion of access charge reform," thus leaving special access charges above cost.[26] To address this problem, "Congress therefore enacted Section 272, which requires a BOC competing in the in-region long distance market to create a separate long-distance affiliate and to recover access charges from that affiliate on the

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18 See *LEC Classification Order*, ¶ 126. In addressing price squeezes, the FCC placed special emphasis on the availability of UNEs. It explained that, "[w]e agree with commenters that assert that the risk of the BOCs engaging in a price squeeze will be greatly reduced when interLATA competitors gain the ability to purchase access to the BOCs' networks at or near cost. . . . As noted, we believe that the ability of competing carriers to acquire access through the purchase of unbundled elements enables them to avoid originating access charges and thus partially protect themselves against a price squeeze." *LEC Classification Order* ¶ 130.

19 *Access Charge Reform First Report and Order*, ¶ 276.

20 *Access Charge Reform First Report and Order*, ¶ 278.

21 *Access Charge Reform First Report and Order*, ¶¶ 278-280.

22 *Access Charge Reform First Report and Order*, ¶ 280.

23 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

24 *See Supplemental Order Clarification* ¶ 22.

25 The obvious impetus for these rules was the recognition that special access rates were well above cost-based rates for loop-transport combinations.

26 *See Supplemental Order Clarification* ¶ 19.

same basis on which it recovers such charges from unaffiliated carriers."[27] The Commission stated that it had "consistently determined" that "those structural and non-discrimination requirements provide adequate safeguards" against anticompetitive behavior.[28] In addition, the Commission stated that, since the use restrictions were "merely temporary" it would be free to take into account any anticompetitive behavior when it established permanent rules.[29] Nonetheless, the *Supplemental Order Clarification* underscores the different frameworks that Congress, and by extension, the Commission, established as protections against anticompetitive conduct by ILECs against long distance carriers relying upon special access to offer interexchange services as opposed to CLECs, who were to be served primarily by unbundled elements.

None of the protections that the Commission has relied upon as diminishing the ILECs' opportunities to engage in price discrimination would be available if local competitors were forced to rely exclusively on tariffed special access as inputs to services offered in competition with the ILECs' own integrated service offerings. Under Commission precedent, therefore, the ILECs would not be constrained in their ability to engage in price and non-price discrimination against competitors in these markets.

First, neither the separate affiliate requirement nor the affiliate transaction rules would apply to protect CLECs. ILECs provide local exchange and exchange access services on an integrated basis. Thus, separate affiliate and affiliate transaction rules that the FCC deemed necessary in the interLATA market to prevent the BOCs from acting on their powerful incentives to discriminate against other interexchange carriers are absent in the local and access markets. It is also significant that the Commission has been allowing the Section 272 separate affiliate requirements to sunset without any analysis as to the consequences for competition. This fact merely would increase the ILECs' opportunities to discriminate against wireline service competitors if transmission facilities are not unbundled.

Second, neither price caps nor the nondiscrimination requirements from Section 272(e) that apply after separate affiliate requirements sunset would come close to providing the protections needed to stop BOC anticompetitive conduct that continued availability of transmission facility UNEs would offer. The special access pricing flexibility rules permit the ILECs to obtain essentially complete freedom from price regulation based on little or no showing of facilities-based competition. Indeed, in Phase II of the pricing flexibility regime, an ILEC is freed entirely from price cap regulation even where it faces no facilities-based competition on *any* channel termination route and no competition on the *vast majority* of interoffice transport routes in an MSA. The complete freedom to discriminate in pricing special access granted in these circumstances renders the limited prohibitions against discrimination in Section 272(e) a dead letter.

The Commission candidly acknowledged that pricing flexibility created a significant risk that ILECs would engage in exclusionary behavior. Specifically, the Commission explained that, "[w]e are concerned, however, about the possibility that price cap LECs could use Phase I relief, which enables them to offer contract tariffs to individual customers, to engage in

27 *See Supplemental Order Clarification* ¶ 19.

28 *See Supplemental Order Clarification* ¶ 20.

29 *See Supplemental Order Clarification* ¶ 20.

exclusionary pricing behavior and thereby thwart the development of competition."[30] It added further that, "[w]e acknowledge that, because we will evaluate pricing flexibility requests on an MSA basis and do not require the presence of competitive facilities in every wire center in an MSA, there remains a theoretical possibility that an incumbent LEC could use pricing flexibility in a predatory manner to deter investment in competitive facilities in those wire centers where it faces no competition."[31] The Commission's concerns extend equally well to transmission facilities along specific routes where the ILECs may face no or extremely limited competition.

The Commission nevertheless decided in its *Pricing Flexibility Order* to accept the risk of anticompetitive conduct resulting from pricing flexibility based on a series of assumptions and predictive judgments, none of which, unfortunately, is justified. The Commission should not compound the problem by eliminating transmission facilities UNEs. For example, the Commission concluded that ILECs are less likely to engage in exclusionary price discrimination if competitors have made significant "sunk investments in facilities used to compete with the incumbent LEC."[32] Significantly, the Commission concluded that investment in the resale of UNEs does *not* represent the type sunk costs that would foreclose ILEC exclusionary/discriminatory pricing.[33] In fact, CLECs have not made significant sunk investments in facilities used to compete with ILECs in local markets.

Despite this promising start, the Commission adopted irredeemably flawed triggers in the *Pricing Flexibility Order* to show that such sunk investments have been made. For channel termination loops, the Commission concluded that, where there are enough wire centers in an MSA in which a *single* collocated carrier uses non-ILEC transport on a *single* point-to-point transport route connected to a wire center, "it seems likely" that competitors will make sunk investment in loop facilities.[34] As mentioned, this approach permits complete elimination of price cap regulation (at Phase II) without any showing that a competitor has deployed even a single loop in an MSA. Thus, flexible pricing of ILEC loop facilities can occur even where no CLEC provides loops on a facilities basis. Moreover, as the Commission concluded in the *Triennial Review Order*, the only appropriate means of determining whether ILECs have diminished ability to exploit their upstream market power over inputs is to rely upon evidence of *actual deployment* of non-ILEC loop facilities.[35] The inadvisability of eliminating transmission facilities UNEs is underscored by the obstacles associated with obtaining access to buildings which effectively prevents non-ILEC deployment of loops even for the largest customers.

The FCC openly acknowledged expressions of the flaws in its channel termination triggers:

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30 *See Pricing Flexibility Order* ¶ 79.

31 *See Pricing Flexibility Order* ¶ 83.

32 *See Pricing Flexibility Order* ¶ 80.

33 *See Pricing Flexibility Order* ¶ 80.

34 *See Pricing Flexibility Order* ¶¶103-104.

35 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 93 (2003) *corrected by errata* 18 FCC Rcd 19020 (2003) ("Triennial Review Order")

> As a number of parties indicate, a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC, and so collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises.[36]

Notwithstanding "the shortcomings of collocation as a measure of competition for channel terminations between end offices and customer premises," the Commission decided to use it anyway because "it appears to be the best option available to us at this time."[37] It should be obvious that this type of approach is hardly an adequate justification now, given that much more reliable indicators of loop investment are available, as evidenced by the loop impairment test adopted in the *Triennial Review Order* (and not overturned by *USTA II*).

The special access *transport* triggers under the *Pricing Flexibility* regime are no more trustworthy. The Commission required that a single collocator in a wire center must be using non-ILEC transport to provide service to trip the Phase I and II triggers.[38] In other words, if a *single* non-ILEC transport facility has been deployed to serve *a single point-to-point route* connecting a wire center, the trigger presumes that there is adequate competitive pressure on *all of the routes* connected to the wire center to prevent ILEC anticompetitive pricing behavior. Moreover, entry by a single user of non-ILEC transport in some wire centers is deemed adequate evidence of competition under Phase II triggers to justify the elimination of price caps for transport connecting other wire centers that are not served by *any* non-ILEC transport and on which there is no basis for concluding that such entry is even *possible*.[39]

The Commission has since repudiated this approach in the context of local and exchange access markets in the *Triennial Review Order* in which it concluded that a proper review of the extent to which competitors have or will make "sunk" investments in transport requires (1) a separate review of different types of transport (*e.g.*, DS1, DS3, and dark fiber);[40] (2) a separate review of *each* point-to-point route or at least those point-to-point routes with similar characteristics;[41] and (3) the presence of at least two (not one) non-ILEC providers of transport in order to protect against "umbrella pricing."[42] *In fact, in the* TRO, *the FCC expressly rejected*

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36 *See Pricing Flexibility Order* ¶103.

37 *See Pricing Flexibility Order* ¶103.

38 *See Pricing Flexibility Order* ¶¶141-142.

39 *See Pricing Flexibility Order* ¶172.

40 *Triennial Review Order* ¶ 376.

41 *Id*. ¶ 376, 397 (rejecting reliance on the pricing flexibility triggers as the basis of impairment review because "the measure does not indicate that the competitive fiber facilities connect to collocations in any other incumbent LEC central offices" beside the single transport route relied upon by the ILEC). The *USTA II* court stated that, in defining the geographic market for transport, the FCC should take into account "facilities deployment along similar [transport] routes when assessing impairment." *USTA II*, 359 F.3d at 375. But the pricing flexibility trigger relies on facilities deployment along one or more transport routes as the basis for eliminating price regulation on other transport routes in an MSA without even attempting the show that those other routes are "similar" to the routes on which facilities deployment has occurred. This approach cannot therefore be squared with the *USTA II* decision.

42 *Id*. ¶ 413, n.1275.

reliance on the transport triggers it deemed adequate for special access pricing flexibility as a basis for assessing impairment in the provision of unbundled transport:

> The record indicates that incumbent LECs have qualified for special access pricing flexibility in numerous MSAs throughout their regions, almost exclusively by meeting the triggers based on special access revenues. Because the revenue trigger requires only a single collocated competitor and the purchase of substantial amounts of special access in a concentrated area, this test provides little or no indication that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers.[43]

Furthermore, in adopting the pricing flexibility rules, the Commission assumed that ILECs would, in general, be precluded by the triggers from charging special access rates that are significantly above cost because "[i]f an incumbent LEC charges an unreasonably high rate for access to an area that lacks a competitive alternative, that rate will induce competitive entry, and that entry will in turn drive rates down."[44] But, as AT&T has argued, it appears that the ILECs' special access prices in general had always been and remain significantly above cost years after the pricing flexibility rules went into effect.[45] Yet competitive entry has not followed. Above-cost rates for inputs offer much greater opportunities for price squeezes or price discrimination since the ILEC can charge the above-cost wholesale prices to itself (yet can continue to make a profit because they are above cost) and retail prices that are at or lower than the above-cost input prices, which are the rates it charges its dependent competitors. At the very least, the Commission cannot deem special access services an adequate substitute for UNEs until it has investigated fully AT&T's assertions.

Notwithstanding the obvious weaknesses of the current special access pricing regime which render any reliance upon the use and availability of special access as justification for a finding of no impairment very precarious, the Commission appears to have assumed that the existence of separate affiliate safeguards in the in-region long distance business would limit ILECs' opportunities to act on their incentive to discriminate. In fact, *the pricing flexibility rules were never intended to limit ILEC opportunities to discriminate in the provision of local exchange and exchange access services they offer on an integrated basis.*

At the time the *Pricing Flexibility Order* was adopted, the Commission assumed that special access would be purchased principally by IXCs. "[W]e note that these services generally are purchased by IXCs."[46] The Commission *did not even consider* the possibility that competitive providers of local exchange and exchange access services might be forced to use special access as in input *in lieu* of UNEs. In fact, in explaining why ILECs would be unlikely to exploit the pricing flexibility to discriminate unreasonably among special access customers, the Commission emphasized that the "IXCs and large businesses" that purchase special access "generate significant revenues for the incumbent and are not without bargaining power with respect to the incumbent." *Id.* No mention was made about CLECs' bargaining position.

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43 *Triennial Review Order* ¶ 397.

44 *See Pricing Flexibility Order* ¶144.

45 *See* AT&T Petition for Rulemaking (filed Oct. 15, 2002), RM No. 10593.

46 *See Pricing Flexibility Order* ¶ 155. *See also* ¶ 142.

A CLEC that seeks to deprive an ILEC of revenue in the ILEC's core retail businesses lacks any such "bargaining power." Indeed, the Commission has concluded that "incumbent LECs have *no economic incentive*, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[47] Given that the BOCs have received Section 271 approval in every state and that Section 274 (which deals with electronic publishing) has sunset, the only supportable assessment is that, at the present time, the ILECs have "no economic incentive" at all to provide transmission facilities to competitive providers of local exchange and exchange access services on terms or at rates that will give them a meaningful opportunity to compete.[48] Given the much different position of a CLEC relative to an IXC *vis-à-vis* an ILEC's core local markets, the Commission's reliance on IXCs' "bargaining power" in negotiating with ILECs for the purchase of special access cannot extend to the CLEC scenario.

Furthermore, in adopting the pricing flexibility rules, the FCC assumed that ILECs would sell special access either to customers that were not also the ILECs' competitors or to customers that compete with ILEC long distance services provided subject to the protections of separate affiliates. No BOC had even been granted Section 271 approval at the time the pricing flexibility rules were adopted (the *Pricing Flexibility Order* was released August 27, 1999 and the first Section 271 approval was released (for New York) on December 22, 1999). More importantly, the FCC assumed that BOCs would be providing in-region long distance through Section 272 affiliates: "[o]nce the Commission grants BOCs permission, pursuant to section 271 of the Act, 47 U.S.C. § 271, to provide in-region long distance services, they are required to offer those services through separate affiliates."[49] Similarly, the Commission relied on the fact that non-BOC ILECs would also be subject to separate affiliate requirements for their in-region long distance service offerings.[50] Throughout the *Pricing Flexibility Order*, the Commission referred to ILEC in-region long distance offerings as provided through "affiliates."[51] In fact, the FCC established special protections against ILEC price discrimination in the provision of special access that are only relevant where the ILEC provides retail service through a separate affiliate.[52] Obviously, in light of the Commission's repeated finding that separate affiliates are necessary to limit ILEC opportunities to engage in price discrimination, the conclusions reached by the Commission in the *Pricing Flexibility Order* cannot be extended to the local and access markets in which ILECs provide service on an integrated basis.

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47 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 55 (1996) (emphasis added). ("*Local Competition Order*").

48 *See e.g., Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001); *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 (2002); SWBT Texas 271 Order.

49 *Pricing Flexibility Order*, n.345.

50 *Pricing Flexibility Order*, n.345.

51 *See, e.g., Pricing Flexibility Order* ¶¶ 129, 134-135.

52 *See Pricing Flexibility Order* ¶ 129 (prohibiting an ILEC from offering a contract tariff to an affiliate unless and until an unaffiliated customer first purchases service pursuant to the contract).

Moreover the ILECs are able to engage in non-price discrimination as easily as they can engage in price discrimination when providing special access. The exclusion of special access from the Section 271 checklist and the absence of any viable federal special access service quality regulations leaves the door wide open for the ILECs to engage in non-price discrimination. Indeed, the Commission held that, even in the presence of separate affiliate requirements, non-price discrimination cannot be detected and punished absent comprehensive service quality performance requirements for access service.[53] The Commission found further that reporting requirements will "increase[] the likelihood that potential discrimination can be detected and penalized" and will "decrease[] the danger that discrimination will occur in the first place." [54] The Commission reached these conclusions in December 1996, well before the BOC mergers increased the participants' incentive to discriminate.[55] Notwithstanding this conclusion, the Commission failed to adopt performance requirements for special access.

Nevertheless, since the *Non-Accounting Safeguards Order*, the Commission has repeatedly recognized the need for special access performance rules. For example, in an NPRM addressing this issue, the Commission explained that special access performance measurements applicable to all incumbent LECs "would provide greater transparency of the incumbent LECs' special access provisioning process" and "should provide a disincentive to the incumbents to engage in any discriminatory activities with respect to these services."[56] More recently, the Commission acknowledged in the *OI&M Order* that there is "a relationship between" the elimination of the operating, installation, and maintenance sharing prohibition and the need for performance rules by stating that "we commit to addressing special access performance metrics in [the special access performance measurements] proceeding expeditiously."[57] It follows that the need is far greater in the local and access markets where ILEC wholesale and retail operations share *every facility, employee and asset*. The opportunities for undetected non-price discrimination in that context are essentially unlimited.

All of this demonstrates that carriers relying on special access loops and transport as inputs for their local exchange and exchange access service offerings would not have the benefit of any of the protections the Commission has in the past deemed necessary to limit the ILECs' opportunities to engage in discrimination. As explained in the following section in greater detail, the *only* protection that CLECs relying on special access have is the ability to purchase UNEs if ILECs engage in unreasonable discrimination. If UNEs were eliminated, however, such competitors would be at the mercy of the ILECs' powerful incentives to discriminate. There is

53 *Implementation of the Non-Accounting)CC Docket No. 96-149 Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*; 11 FCC Rcd 21905, ¶ 242 (1996) ("*Non-Accounting Safeguards Order*").

54 *Non-Accounting Safeguards Order* ¶ 243

55 *See SBC-Ameritech Merger Order*; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic-NYNEX Merger Order*")

56 *Performance Measurements and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 ¶ 13 (2001) ("*Performance Metric NPRM*").

57 *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger Order*, ¶ 24, CC Docket No. 01-337, March 17, 2004 ("*OI&M Order*")

therefore no basis for concluding that special access can qualify as a substitute for UNEs in this context.

4. The Experience of CMRS Carriers Using Special Access Provides No Relevant Guidance About The Role That Special Access Could Play In The Local *Wireline* Markets

The development of CMRS competition over the past two decades in reliance on special access for interoffice transport evidence that wireline competitors could do the same in providing high-capacity end user services. The CMRS market is fundamentally different from the wireline local and access market for at least four reasons. *First*, BOCs have diminished incentives to engage in discriminatory conduct to benefit affiliated CMRS operations. Unlike their wireline operations, the BOCs share ownership of their CMRS operations with other carriers. For example, Verizon owns only 55% of Verizon Wireless (Vodafone owns 45%), BellSouth owns only 40% of Cingular, and SBC owns 60% of Cingular. To be sure, these ownership interests are high enough to give the ILECs *some* incentive (absent other factors such as those discussed below) to discriminate. But that incentive is necessarily significantly lower than is the case with an affiliate (or integrated wireline operations) of which a BOC owns 100%. Similarly, Qwest owns 100% of its CMRS operations, but its incentive to discriminate is significantly diminished by the fact that it provides service through the resale of Sprint PCS service.[58] Qwest discrimination in favor of Sprint PCS will benefit not just Qwest, but other providers of Sprint PCS services (including, of course, Sprint itself).

Second, BOC-affiliated CMRS providers must offer service in the territories of other BOCs and those other BOCs have their own affiliated CMRS operations. It is clear therefore that discriminatory behavior in one region could cause other BOCs to retaliate. This set of circumstances significantly diminishes the incentive of a BOC to discriminate against CMRS carriers in-region. In contrast, BOCs have not sought to enter out-of-region wireline markets to any significant degree, thus avoiding the threat of retaliation respecting wireline services.

Third, the BOCs' incentive to engage in predatory conduct against unaffiliated CMRS carriers is likely diminished by the financial strength and stability of the five (four if the Cingular-AT&T Wireless merger closes) ubiquitous CMRS competitors, a situation that stands in stark contrast with the competitive wireline industry. These carriers all developed their infrastructure and gained their market share during periods of unparalleled growth which have no counterpart in the wireline context. Wireline CLECs do not have even close to the size, stability or ubiquity of CMRS carriers relative to their respective markets. Moreover, since the CMRS carriers rely on spectrum for the last-mile connections to end users, they do not depend upon special access for loops, as do wireline customers seeking to serve users needing high-capacity connections. Further, spectrum cap limits also limit the extent to which any single wireless carrier can acquire another carrier, or reduce the number of competitors. This means that CMRS providers, including those in which the BOCs have substantial, if not controlling holdings, have

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[58] On July 8, 2004, Verizon Wireless and Qwest Wireless filed an application with the Federal Communications Commission seeking consent to transfer the assets of Qwest Wireless to Verizon Wireless. See FCC Public Notice, QWEST WIRELESS, LLC AND CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS SEEK COMMISSION CONSENT FOR THE ASSIGNMENT OF SIXTY-TWO BROADBAND PERSONAL COMMUNICATIONS SERVICES LICENSES, WT Docket No. 04-264, DA 04-2254 (filed July 22, 2004).

to operate within a market structure in which there will be, as a practical matter, a set number of largely ubiquitous competitors.

Fourth, the BOCs' ability to act on any incentives they have to discriminate in favor of affiliated CMRS operations are significantly reduced because Verizon's, BellSouth's and SBC's affiliated CMRS operations are all separate corporate affiliates. This makes discrimination must easier to detect (as the FCC found with regard to Section 272 affiliates for interLATA service) by both regulators and competitors. It should be obvious, therefore, that the BOCs have neither significant incentives nor the opportunity to engage in anticompetitive discrimination against unaffiliated competitors in the CMRS market.

5. Verizon's Attempt To Rely On Aggregate Special Access Purchases By "Competitive Carriers" As The Basis For A Finding Of No Impairment For Transmission Facilities Is Unpersuasive.

Notwithstanding the foregoing, Verizon asserts that CLECs rely on special access as their primary means of obtaining transmission inputs and that this demonstrates that there is no need to require that these facilities be unbundled *anywhere, even in those areas where non-ILEC deployment of transmission facilities would be inefficient*.[59] Verizon's argument is utterly meritless.

As a preliminary matter, the highly aggregated data on special access usage provided by Verizon offers no basis for any conclusions regarding CLEC usage. Verizon merely states that a high percentage of the total DS1s, DS3s, entrance facilities and EELs purchased by "competitors" are originally ordered (ignoring later conversions) as special access.[60] It is impossible to know if the vast majority of the special access circuits counted by Verizon in its study (assuming the study is even accurate, an assumption that cannot be verified without access to the unidentified "database" relied upon by Verizon) were in fact purchased for the purpose of providing CMRS and stand-alone long distance services. This is a potentially significant distinction because, as explained above, CMRS providers are largely sheltered from Verizon's incentive to engage in anticompetitive behavior and long distance carriers are only now becoming vulnerable to the full force of anticompetitive behavior as the Section 272 separate affiliate requirements sunset. It is simply impossible to know from the Verizon study the ratio of UNEs-to-special access transmission facilities purchased by CLECs competing in the local and access markets.[61] In addition, it is difficult if impossible to know from Verizon's study whether the special access circuits were deployed as loop transmission facilities or transport facilities, and thus the degree of relevance, assuming the study has any, to an impairment analysis of unbundled loops versus unbundled transport.

Nevertheless, as explained in more detail below, XO understands from its own experience that CLECs are often forced into purchasing loops, transport and EELs as special access circuits because ILEC litigation positions and self-help preclude access to UNEs. In other

59 *See Verizon Special Access Letter*, "Competitors are Capable of and Are Using Special Access to Compete Successfully," at 17-19.

60 *See id.* Declaration of Judy K. Verses et al ¶ 49.

61 XO does not have specific information regarding its CLEC competitors' relative usage of special access and transmission facility UNEs, but the point remains that Verizon has utterly failed to demonstrate the relevance of the numbers in its *ex partes* to this, the pertinent question.

situations, ILECs have made the purchase of special access a prerequisite to UNEs, a factor which could skew the special access-to-UNE ratio higher. In either event, a forced "willingness" of CLECs to rely on special access in the short term until unbundled network elements can be obtained, when, in fact, the CLECs have no real alternatives if they want to enter into or expand within a local market, is not a basis for a finding of no impairment. Indeed, as explained below, XO cannot implement its market entry plan and cannot achieve profitability if it is forced to rely exclusively on special access in perpetuity. The Commission has correctly concluded that impairment exists where the relevant entry barriers "make entry into a market uneconomic."[62] As the D.C. Circuit held, however, the Commission must specify "[u]neconomic by whom?"[63] The appropriate answer to this question is "uneconomic by a reasonably efficient CLEC." It is not enough that a CLEC can rely on special access as a means of serving customers, especially where it does so unprofitably in the hopes of obtaining UNEs in the future to serve the customer and even more so where its overall business is unprofitable and has no assurance of being profitable in the future.

In this regard, CLECs relying on special access to provide competitive local and access services are in a fundamentally different position from CMRS providers. The D.C. Circuit held that the FCC must explain why a carrier can be impaired where it has used special access "not only to survive *but to flourish*" and where such reliance on special access has "obviously not made competitive entry uneconomic."[64] This is simply not the case with CLECs, and Verizon has offered no evidence to the contrary. Verizon makes much of the fact that Time Warner Telecom ("TWTC"), which it describes as "one of the most successful competing providers in the country" uses special access *in lieu* of UNEs. But TWTC *does not even earn an overall profit on its operations.* There is simply no way to characterize Time Warner Telecom as an example of a CLEC that has not only been able to "survive" but to "flourish" by relying on special access.

Another fundamental problem with relying on current usage of special access – even if the data were limited to CLECs providing competitive local and access services – is that such data ignores the powerful constraining effect the availability of UNEs has on ILEC behavior. As explained earlier, the ILECs have the incentive to find opportunities to discriminate. The presence of UNEs offer far fewer such opportunities because the prices of unbundled transmission facilities are based on cost and they are subject to performance rules as a result of Section 271 proceedings. Verizon and other BOCs, therefore, have strong incentives to substitute special access for UNEs. They can achieve this by offering special access loops, transport and EELs on terms and conditions that allow at least some competitive entry to limp along (albeit unprofitably) while at the same time creating as much legal uncertainty for UNEs as possible by (as they obviously have done) pursuing a relentless scorched earth litigation strategy coupled with aggressive self-help measures to exploit every possible ambiguity in their legal obligations. The obvious outcome of this strategy is to temporarily reduce the cost of special access (again, just to the level where still-unprofitable CLECs can barely hang on) while at the same time reducing the availability of and increasing the effective cost of UNEs. Once UNEs are eliminated, the BOCs are then free to act on all of their powerful incentives to discriminate without constraint to drive CLECs out of business or at the least force them into fringe competitors that have little ability to discipline BOC behavior. Thus, making special access a

62 *Triennial Review Order* ¶ 84.

63 *See USTA II*, 359 F.3d at 572.

64 *USTA II*,. 359 F.3d at 376, 377 (emphasis supplied).

marginally viable entry vehicle in the short run serves the ILECs' long term interests. That CLECs have been forced to purchased special access under these circumstances in no way demonstrates that the special access would be a viable basis for sustained competition once UNEs are eliminated.

6. The Elimination Of Unbundled Loops And Transport Based On The Availability Of Special Access Would Make "Competitive Entry Uneconomic" For Competitive Providers Of Local And Access Services Like XO.

The assertions made by Verizon in its *ex parte* presentations regarding CLEC use of special access circuits are wholly inconsistent with XO's practices and experience. To the extent that XO, the largest CLEC in the country, purchases DS-1 and DS-3 circuits from incumbent local exchange carriers to serve XO's end user customers, it does so primarily through the use of unbundled network elements, not special access circuits. Only a minority of the DS-1 and DS-3 circuits that XO purchases from the ILECs are special access. Moreover, to the extent XO has ordered high capacity circuits as special access, it has often been as the direct result of anti-competitive policies and actions of the incumbent local exchange companies, including Verizon, that were described above.[65] This same anticompetitive ILEC behavior continues to thwart the CLECs' abilities to convert special access circuits to UNEs even today, almost a year after the Commission's release of the Triennial Review Order.[66]

As this Commission is well aware, CLECs historically were forced to order circuits as special access as a direct result of ILEC policies not to "construct" facilities, including installation of a line card or other minor electronics. Verizon in particular adopted this unlawful "no-facilities" policy as a means of forcing CLECs to order special access instead of UNEs.[67]

For a long period of time, the ILECs were not required to combine network elements so that if a CLEC wished to use ILEC facilities to serve an end user out of an ILEC central office within which it did not have a collocation, it had to order such facilities as special access. Even upon reinstatement of the Commission's combinations rules, the ILECs were intransigent in permitting such combinations. See e.g., XO Communications, *Ex Parte* Presentation, CC Docket No. 96-98, at 5 (filed Aug. 24, 2001) at 10 (detailing, among other things, anti-competitive ILEC EEL conversion practices in the wake of reinstatement of the existing combination rule)("XO *Ex Parte*"). The ILECs have been similarly dilatory with regard to converting special access circuits to stand-alone UNEs. When requesting conversions from special access to UNE/EEL, XO has experienced endless negotiations, delayed conversion requests, requirements that circuits

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[65] The percentage of high capacity special access circuits that XO currently purchases from Verizon are nowhere near the levels that Verizon has alleged for the CLEC industry as a whole. Moreover, without conceding the accuracy of the percentages of special access circuits that Verizon claims are initially ordered by CLECs as a whole, to the extent that Verizon is seeing a high percentage of purchases of special access circuits by CLECs, it is most likely attributable to its adoption of anti-competitive policies.

[66] XO is primarily engaged in the provision of local services to its end users. At the same time, however, XO does provide a relatively small subset of services that do not qualify for use of UNEs. Accordingly, to provision these services, XO willingly orders the underlying circuits as special access. Again, Verizon's *ex partes* seemingly do not distinguish between the ordering of special access circuits for the provision of services that qualify for UNE treatment versus those that do not.

[67] *See* Comments of XO Communications, Inc., *Application by Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347, at 15-17 (filed Jan. 14, 2002).

be disconnected and reconnected, threats from the ILECs to impose additional charges,[68] and overly-long provisioning intervals. *See id.* Finally, the ILECs historically prohibited commingling of access services and UNEs on the same facilities to serve an end user customer, thus posing yet another barrier to CLECs ordering UNEs.

As a result of the foregoing ILEC practices, CLECs were forced to order circuits as special access, were prevented from converting such circuits to UNEs, and had no choice but to sign up for term and volume commitments in order to secure the best possible transmission facility prices under the circumstances into which the ILECs forced them. These commitments and the early termination penalties imposed under such commitments in turn prevent many CLECs from subsequently converting many of their embedded special access circuits to UNEs.

Although the Commission in its Triennial Review Order sought to put an end to a number of the anti-competitive practices discussed above, it has been XO's experience that the ILECs continue to engage in these practices. Verizon continues to impose its "no-facilities" policy on CLECs, refusing to recognize that the Commission's routine network modifications requirements are self-executing and insisting that CLECs must amend their interconnection agreements to include non-recurring charges for routine network modifications, the costs of which are already recovered in the TELRIC rates for the associated UNE. Similarly, notwithstanding the Commission's self-effectuating prohibition on unnecessary charges to convert special access circuits to UNEs, XO continues to face ILEC imposition of such charges.[69] In addition, many ILECs, including Verizon, continue to impose minimum monthly service commitments on all special access circuits so that CLECs must wait a minimum of 90 days before converting a DS-1 circuit to UNE pricing and a minimum of one year before converting a DS-3 circuit to UNE pricing.

In an effort to further minimize its reliance on special access, XO has sought to implement the TRO's requirements regarding commingling and new EEL criteria through amendments to its ILEC interconnection agreements. To date, the only major ILEC with which XO has been able to negotiate such an amendment is Qwest. After failing to engage in any substantive negotiations with XO to implement a TRO amendment, Verizon filed for consolidated arbitrations across the country with virtually every CLEC with which it had an interconnection agreement. Shortly after the DC Circuit Court issued its *USTA II* decision in early March, Verizon determined that it would be in its best interest to put the entire arbitration process on hold and sought abeyance orders from the relevant state commissions. XO and other CLECs opposed Verizon's abeyance motions as they related to issues unaffected by the *USTA II* decision, such as the TRO's commingling, EEL certification, and routine network modification requirements. These CLECs requested that the affected state commissions bifurcate the arbitrations so that the parties could proceed to implement amendments to their agreements to reflect the FCC rulings regarding commingling and EELs. Verizon, not surprisingly, has vehemently opposed this effort by XO and other CLECs, thus attempting to preserve further its

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68 For example, XO's attempts over a twelve month period beginning in 2002 to convert 1000 DS-1 special access circuits were unsuccessful due to BellSouth's insistence that the circuits be disconnected and reconnected and that XO pay per circuit conversion charges that were double the non-recurring charge for installation of a special access circuit. Indeed, these conversion charges were thirty times higher than BellSouth's allegedly "cost-based" rates for conversion of special access circuits to EELs.

69 In fact, XO is currently embroiled in a dispute with BellSouth over that ILEC's insistence that it may impose upon XO a per circuit charge related to conversion of DS-1 special access circuits to UNE that is roughly equivalent to the non-recurring charge for the underlying special access circuit.

ability to engage in anti-competitive policies that force CLECs to order and maintain high capacity circuits as special access.

Conclusion

For the reasons explained herein, the Commission should establish a "blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment" for at least those requesting carriers seeking to use unbundled high capacity loops and transport to provide local and access services.

Sincerely,

/s/ Chris McKee

Christopher T. McKee

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Kevin Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
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Jeffrey Carlisle
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